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No. 82-6840

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

MICHAEL P. JAMES,

*Petitioner,*

v.

COMMONWEALTH OF KENTUCKY,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of Kentucky**

## BRIEF FOR PETITIONER

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## QUESTION PRESENTED FOR REVIEW

Is it a denial of a criminal defendant's Fifth and Fourteenth Amendment rights against compulsory self-incrimination and to due process of law where a state trial court denies a timely request for an "admonition" directing the jury that no adverse inference may be drawn from the defendant's failure to testify, where an "admonition" is the functional equivalent of the "instruction" mandated by this court in *Carter* v. *Kentucky?*

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## OPINION BELOW

The opinion of the Supreme Court of Kentucky was rendered on March 30, 1983, and is to be published. [Joint Appendix, hereinafter JA, pp. 112-115].

## JURISDICTION

The opinion of the Supreme Court of Kentucky was entered on March 30, 1983. No rehearing was sought. A timely petition for writ of certiorari was filed on May 27, 1983. On October 17, 1983 this Court granted the petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which states in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

The Fourteenth Amendment to the United States Constitution, which states in pertinent part:

> . . . nor shall any State deprive any person of liberty . . . without due process of law . . .

## STATEMENT OF THE CASE

Michael P. James (hereinafter, petitioner) was indicted by the September, 1981 term of the Franklin County (Kentucky) Grand Jury, and charged with the offenses of burglary in the second degree; rape in the first degree; and, receiving stolen property over $100. [JA, pp. 3-4]. Further, petitioner was charged with being a persistent felony offender in the first degree. [JA, p. 4].

Trial commenced on January 18, 1982. Before the introduction of any evidence, petitioner's trial counsel

moved to sever the burglary from the rape charge on the grounds that the cumulative prejudice of the trial of different counts together would be "inconsistent with the presumption of innocence. . . ." [JA, p. 12]. The trial court overruled the motion "with the observation that even though it's a rebuttable presumption, the presumption of innocence is a fiction which is used only as another means of saying that a defendant cannot be convicted unless and until he is proven guilty beyond a reasonable doubt. And it ought to be worded that one charged with a crime should not be presumed guilty unless and until proven so beyond a reasonable doubt by solid, substantial, and credible evidence. I'm starting the crusade today." (JA, p. 13].

Trial counsel also moved to amend the indictment relating to petitioner's alleged status as a persistent felony offender (PFO) from first degree to second degree.[1] The trial court also overruled this motion. [JA, p. 17]. The prosecutor then declared his intention to impeach petitioner's credibility with his prior forgery conviction in the event that petitioner elected to testify. [JA, p. 17].

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[1] KRS 532.080(3) requires, *inter alia*, that a defendant have at least two (2) previous felony convictions to enhance punishment. KRS 532.080(2) (persistent felony offender in the second degree) requires only one (1) previous felony conviction. Although in petitioner's case either persistent felony offender in the first degree or persistent felony offender in the second degree would enhance the possible range of punishment from 10-20 years to 20 years-to-life imprisonment, persistent felony offender in the first degree is substantially more onerous in that KRS 532.080(7) precludes consideration of probation, shock probation,, or conditional discharge, and further, requires a minimum term of imprisonment of ten (10) years before eligibility for parole. Otherwise, convicted persons are eligible for parole after service of 20% of their term of imprisonment, but in no event more than eight (8) years must be served before eligibility for parole. 501 KAR 011 (1980).

During voir dire, petitioner's trial counsel attempted to explore the jurors' attitudes given the threat of impeachment:

(Mr. Peale): I want to ask you another question that I think's important, whether the fact that a person made a mistake would prevent you from considering the facts that will—Would it make you believe the fact that they are more likely to make another mistake at a later time?

I'll ask that again, whether the fact that a person made a mistake at some time in the past would make you feel that more than likely he made another mistake, or she made another mistake at a later point in time?

Mr. Foster: I think it depends on how many mistakes they've made beforehand. The first mistake I don't think it would cause any problems; but if someone had a history of making similar mistakes it would be a problem for me.

Mr. Peale: Mr. Foster?

Mr. Foster: That's right.

Mr. Peale: You think that knowledge of the fact that someone had made a mistake previously would prevent you from given due consideration to the facts or circumstances of the supposedly second mistake?

Mr. Foster: I'm not sure I understand.

Mr. Peale: The fact that one might have made a mistake at one time in the past and

they come in and made a second mistake, I am saying is it possible that the fact that you know of the first mistake would prevent you from hearing all the facts and circumstances of the second mistake to determine that, well, you know, they really wouldn't know what was going on?

Mr. Foster: One mistake? Is that what that means?

Mr. Peale: Yes.

Mr. Foster: No, that would not get in my way.

Mr. Peale: It wouldn't? Okay. Okay. It's a very involved and complicated question but I have my reasons for stating it as I did.

Mr. Foster: I understand that.

[JA, p. 27].

Later, petitioner's trial counsel attempted to inquire into the jurors' beliefs or opinions in the event that petitioner did not testify. However, the trial court precluded trial counsel from effectively pursuing this line of questioning:

(Mr. Peale): Mr. Rohrer, would the fact that in trying this case the defendant did not take the witness stand create an inference in your mind as to his innocence or guilt?

Mr. Rohrer: No sir.

Mr. Peale: Do you feel that you would still be able to afford him a presumption of innocence that he's entitled to?

Mr. Rohrer: Yes sir.

Mr. Peale: And still consider all the evidence as it was presented from this witness stand?

Mr. Rohrer: Yes sir.

Mr. Peale: Do any of you feel that you would form a decision in this case if the defendant chose not to testify?

Do you have any problems with that?

The Court: They just said they could try the case on the law and the evidence, Mr. Peale.

Mr. Peale: Well, Your Honor, again, this is one area that I think moves outside of the law and the evidence. It's one of personal attitude that there might be something to hide or that something of that nature that might be prejudicial to the defendant's case If that's possible, I'd like to know. I think they're obligated to tell me.

The Court: They have said they would try the case solely upon the law and the evidence. That excludes any other consideration, Mr. Peale.

Mr. Peale: Well, Your Honor, I've finished my voire [sic] dire. Defense passes the jury.

[JA, pp. 29-30].

The first witness for the Commonwealth was the prosecutrix, Donna K. Richardson. Ms. Richardson testified that on April 23, 1980, she returned to her home, when

she noticed that the light was out on the front porch. [JA, p. 30]. The lightbulb had been unscrewed from the socket, so that when it was screwed back in, the light came back on. [*Id*]. Also, her door was ajar. [*Id*]. After entering the house, she found that a pistol had been stolen from under her pillow. [*Id*]. She then identified the Commonwealth's Exhibit No. 1 (a pistol and a box) as the pistol and box which had been stolen from her home during the burglary.[2] [*Id*].

Ms. Richardson related that subsequently, on May 1, 1981, the glass had been taken out of her screen door in the kitchen and the locks were undone. [JA, p. 31]. Although nothing was missing from her apartment, the pillows on her bed had been messed up. [*Id*]. (This alleged unlawful entry constituted the burglary with which petitioner was charged).

Ms. Richardson said that on May 6, 1981, she went home from work for lunch. [JA, p. 32]. She stated that while she was at home, petitioner came to her apartment and asked to use the phone to call a doctor, saying his wife was sick. [*Id*]. As she started to dial a number of her own doctor, petitioner grabbed her mouth with his hand, put a gun in her side, and told her to hang up the phone. [*Id*]. She stated that petitioner told her to do as he said, or he would kill her. [JA, p. 33]. She said that when petitioner attempted to shove the front door closed, the gun went off into the floor. [*Id*]. According to Ms. Richardson, petitioner took her to the bedroom, where he tied her hands behind her back and gagged her mouth. Ms. Richardson stated that petitioner then told her they were going to go to his house. [*Id*].

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[2] Petitioner was on trial for receiving stolen property, related to his alleged possession of the pistol on the day of his arrest. However, he was not charged with the April 23, 1980 burglary.

Ms. Richardson stated that after going to petitioner's house, he told her to take her clothes off. [JA, p. 34]. Petitioner allegedly got a towel, layed it across the bed, and then engaged in sexual intercourse with her. [*Id*]. According to Ms. Richardson, petitioner then allowed her to wash up, and let her leave after she promised that she would not tell anyone. [*Id*]. Before leaving, she was able to secure from petitioner the return of her purse, which contained a second gun. [JA, p. 35].

After she was released, Ms. Richardson returned to work. [JA, p. 36]. Because she was frightened, she did not call the police until later that evening. [*Id*]. After the police were called, Ms. Richardson went to King's Daughters Memorial Hospital in Frankfort. [*Id*]. At trial, Ms. Richardson identified two cloth strips which had been seized from a gym bag purportedly belonging to petitioner as appearing to be the same strips that were used to tie and gag her. [*Id*].

The next witness for the Commonwealth was Officer Scott Clark. [JA, p. 50]. Officer Clark investigated the break-in at Donna Richardson's home on May 1, 1981. [JA, p. 51]. Clark dusted the windowpane from the rear storm door for fingerprints, and found one latent print on the inside glass. [*Id*]., He attached the latent print to an offense report, and gave it to Detective Courtney. [JA, p. 52].

Trooper John M. Sparks of the Kentucky State Police testified that on May 6, 1981 he transported Donna Richardson to the hospital. [JA, p. 54]. He received her blood sample from a nurse on duty. [*Id*]. After this, he went to petitioner's home with Detectives Owen and Courtney, and then proceeded to Kentucky State Univer-

sity, where petitioner was arrested. [JA, p. 55]. Trooper Sparks then identified a gym bag which was taken from petitioner on the evening of his arrest. [JA, p. 56]. The prosecutor then asked Sparks, "[d]id the defendant make any sort of a statement concerning how he came to have this weapon in his posssession at this particular time?" [JA, p. 58]. Sparks responded: "No sir. After advising the defendant of his rights, he did not make any statement whatsoever regarding anything." [*Id*].[3] Sparks identified a gun from the gym bag, which was the same gun previously identified by Ms. Richardson as the gun stolen from her apartment. [*Id*].

Trooper Sparks also testified that, in processing the victim's apartment, he discovered a smashed bullet laying on the floor near the doorway. [JA, p. 59]. The bullet appeared to have ricocheted off an interior wall behind the door. [*Id*].

The next witness was Detective Claude Owen of the Kentucky State Police. Detective Owen stated that on May 6, 1981, he contacted Detective Courtney, who told him that Donna Richardson had identified her assailant as a person named "Mike" who lived next door to her, but she didn't know his last name. [JA, p. 71]. After ascertaining petitioner's full name,[4] an arrest warrant was obtained for petitioner. [JA, p. 72].

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[3] Petitioner would note that this statement violates the holding of this Court in *Doyle* v. *Ohio*, 426 U.S. 610 (1976), prohibiting comment upon a defendant's post-arrest, post-*Miranda* exercise of his right to remain silent. Because there was no contemporaneous objection to either this statement, or a similar statement at trial by Det. Courtney (JA, p. 75), petitioner did not raise this claim in the Kentucky Supreme Court, nor does he do so here.

[4] Another Frankfort police officer, Officer Boetcher, recalled there being a fire next door to Donna Richardson at an earlier date. The Frankfort Fire Department apparently provided petitioner's full name to the investigating police officers. [JA, pp. 71-72].

Owen proceeded to petitioner's home. [*Id*]. Petitioner's wife advised the officers that petitioner was at Kentucky State University, coaching a basketball game. [*Id*]. After arriving at the University, the officers waited until the game ended, at which time petitioner was arrested. [*Id*].

The next witness for the Commonwealth was Detective Robert Courtney of the Frankfort City Police Department. When asked whether petitioner at any time explained to Courtney "how he happened to have in that duffle bag a gun which had been stolen from Donna Richardson," Courtney responded, over petitioner's objection, that "the only thing the defendant explained to me about the duffle bag was that he didn't know whose duffle bag it was." [JA, p. 74].

The next witness for the Commonwealth was Mr. James E. Evans, who was employed by the Kentucky State Police Identification Unit. After comparing the latent print taken from the storm door of the residence of Donna Richardson with the inked fingerprints taken from petitioner after his arrest, it was his opinion that the latent fingerprint was the same as the impression on the inked prints of petitioner's left ring finger. [JA, p. 76]. On cross-examination, Evan's acknowledged that there is no way to determine how old a latent print might be. [Transcript of Evidence, Vol. III, p. 82]. Prints on the inside of buildings (i.e., not exposed to atmospheric conditions) can last several years. [*Id*].

The next witness was Mr. Edward Taylor, a forensic serologist with the State Crime Laboratory in Frankfort. Taylor testified that he examined Ms. Richardson's blood sample and found her to be a group A secretor. [JA, p. 77]. Taylor also determined that the two strips of cloth

submitted by Detective Owen were found to contain saliva and group A factors. [*Id*].

On cross-examination, Taylor stated that while the white towel that was recovered from Mr. James' home contained samples of hair, the hair was dissimilar from that of the victim. [T.E. Vol. IV, p. 12]. In fact, the hair samples which were found on the white towel were similar to the caucasian head hair and pubic hair of Mrs. James, petitioner's wife. [*Id*]. The towel also contained acid phosphatase, which is a constituent of semen. [T.E. Vol. IV, p. 13].

The final witness for the Commonwealth was Mr. David Adams. Adams was an employee of the office in which Donna Richardson was employed. [JA, p. 80]. Adams stated that on May 6, 1981, Ms. Richardson returned from lunch sometime between 4:30 and 5:00 p.m. [*Id*]. Ms. Richardson came into his office crying, nervous and upset. [*Id*]. At that time, Ms. Richardson told him that she had been raped. [JA, p. 81]. He testified that Ms. Richardson told him that she did not report the incident because "[t]hat's the only way I could get away, that he'd let me go if I didn't tell anyone. Otherwise, he'd kill me." [*Id*].

At the close of the Commonwealth's case, petitioner moved for a directed verdict of acquittal, which was overruled. [T.E. Vol. IV, p. 26].

Petitioner's trial counsel then proceeded with his opening statement, the gist of which was to the effect that the alleged crime could not have happened because petitioner's witnesses would have seen the prosecutrix had the crime occurred:

> There will be testimony to the effect that there was a gentleman who is present most of the afternoon dur-

> ing the alleged times that this incident occurred, who had the occasion or the opportunity to observe and see this if it, in fact, did so occur.
>
> * * *
>
> This gentleman's testimony will be that he was in this area most of the afternoon, and particularly during the time that the victim was supposed to have left Mr. James' residence, that he could not have missed seeing Ms. Richardson if she did so, in fact, leave Mr. James' home.
>
> [Transcript of Evidence, Vol. IV, pp. 28-29].

The first witness for petitioner was Mr. Marion Bates. [JA, p. 85]. Bates testified that he lived at 266 E. Main Street in Frankfort. [*Id*]. On May 6, 1981, he was in his yard working on his car. [JA, p. 86]. Around noon time, Chuck Lambert approached him and asked him to come and see his basement, which he had renovated. [JA, pp. 86-87]. The basement was in the house in which petitioner lived. [*Id*]. Bates testified that he was in the basement at approximately 12:40 p.m., at which time Lambert had to return to work. [JA, p. 88]. Bates returned to his driveway to work on his car. [*Id*]. In the meantime, petitioner had come out of the house, locked the door, and went up the street. [*Id*]. When Bates was in the house, he had heard nothing upstairs but the record player. [*Id*]. During the time that Bates was out front working on his car, he did not see anyone go into or out of petitioner's apartment. [JA, p. 89].

The final witness for petitioner was Charles Lambert. Lambert stated that he did not recall showing his property to Bates on the particular date of May 6, 1981, but that

it was not unusual for him to show Bates his property. [JA, p. 95].

Petitioner did not testify. However, at the close of all the evidence, petitioner requested that an admonition be given to the jury with regard to his failure to testify. The motion was overruled. [JA, p. 95].

In his closing argument, petitioner's trial counsel presented petitioner's defense, in essence, as resting upon reasonable doubt and the presumption of innocence. As to the burglary, trial counsel argued that there was no evidence presented that the petitioner entered Ms. Richardson's home on May 1, 1981, other than a fingerprint which could have been impressed at any time. [JA, p. 96]. As to the rape, trial counsel argued that had it occurred, someone would have seen Donna Richardson entering or leaving petitioner's home:

> No one saw this. He was supposedly doing this at gunpoint, during the lunch hour in Frankfort on a business day. We know what kind of town Frankfort is. We know what kind of town Frankfort is. Frankort is a town that there are a lot of state workers. There is a lot of commotion especially up and down East Main Street. No one saw this.
>
> [JA, pp. 97-98].

Petitioner's trial counsel did not attempt to establish a motive for the accusations made by Donna Richardson.

The prosecutor's closing arguments on several occasions infringed upon petitioner's right to not testify. For example, the prosecutor told the jury that:

> Everywhere you look, and this I think is a strong feature of this case, what a young lady told you from the witness stand is validated. *You never found a single time in the evidence where he contradicts one thing that she told you . . .*
>
> * * *

> She said he bound her hands with two pieces of strips of cloth. Isn't it strange that he had a bag on his person a few hours later and had two pieces of cloth in it, not three, not one, not seven. How could she have known that if she hadn't been there and this hadn't taken place. There's no way any one could know that. *That has never been explained except what the record shows as the truthful statements of this victim.*
>
> [JA, pp. 106-108 (Emphasis added)].

The prosecutor further enhanced his references to petitioner's failure to explain incriminating evidence by commenting upon the failure of petitioner to present his wife's testimony:

> Now I'm going to make a little statement. How do we know what this defendant's wife's blood type is. There is no way we can know. That is not available to us. She is not charged with a crime I submit to you if her blood type was group A, you would have heard it from this witness stand, but I don't recall that Lisa James came and testified. So why do they want to run you down that trail?[5]
>
> [JA, p. 108].

After deliberating, the jury convicted petitioner of second degree burglary, and fixed his sentence at ten (10) years imprisonment. [Transcript of Record, p. 37]. Petitioner was also convicted of rape, and sentenced to twenty (20) years imprisonment. [*Id*]. Finally, the jury con-

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[5] Prosecutorial comment upon the failure of a defendant to call a spouse to testify for the defense has been held to violate Kentucky statute, and constitutes reversible error. KRS 421.210(1); *Gossett* v. *Commonwealth*, Ky., 402 S.W.2d 857 (1966). Petitioner acknowledges that any error in this regard is arguably not cognizable as federal constitutional error. However, petitioner submits that the prosecutor's comments in this regard magnify both the comments upon his own failure to testify and testimony of police officers to the effect that petitioner failed to explain incriminating evidence.

victed petitioner of receiving stolen property, and fixed his punishment at twelve (12) months incarceration. [Transcript of Record, p. 38].

After petitioner's conviction on the principal offenses, the trial continued with the persistent felony offender (PFO) proceedings. The jury convicted petitioner as a first degree PFO, and fixed his punishment at life in the penitentiary. [JA, pp. 8-9].

On appeal, the Kentucky Supreme Court affirmed petitioner's conviction. *James* v. *Commonwealth*, Ky., 647 S.W.2d 794 (1983). [JA, pp. 112-115]. In disposing of petitioner's argument that he was entitled to judicial guidance with regard to his Fifth Amendment privilege, the Court held that:

> James requested that the trial court give an "admonition" to the jury that no emphasis be given to James' failure to testify. This request was denied by the trial court. In his arguments on this appeal James attempts to equate this request for an admonition with a request for an "instruction" on failure of the defendant to testify. *Carter* v. *Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), held that a state trial judge has the constitutional obligation to give a prophylactic instruction upon proper request to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify. *There is a vast difference in a request for an admonition and a requested instruction. James was entitled to the instruction, but did not ask for it. The trial court properly denied the request for an admonition.* [JA, p. 114 (Emphasis added)].

Subsequently, this Court granted James' petition for writ of certiorari to the Supreme Court of Kentucky.

## SUMMARY OF ARGUMENT

At petitioner's criminal trial, the trial judge refused petitioner's request to admonish the jury in regard to petitioner's failure to testify. On appeal, the Supreme Court of Kentucky affirmed, holding that petitioner's request for an admonition was not equivalent to a request for the instruction mandated by this Court in *Carter* v. *Kentucky*, 450 U.S. 288 (1981).

Petitioner's claim herein is based upon the explicit guarantee contained in the Fifth Amendment to the federal Constitution which prohibits compelled self-incrimination. That right is made applicable to the states through the due process clause of the Fourteenth Amendment. Decisions of this Court have elucidated the principle that the Fifth Amendment is implicated when a criminal defendant suffers a penalty as a result of his failure to testify. Thus, not only has adverse comment on a defendant's failure to testify been prohibited, but further, judicial guidance as to jurors' understanding of the privilege has been mandated.

Because the trial judge has the unique power to reduce jury speculation as to a defendant's failure to testify, the trial court must avail itself of that power upon the defendant's timely request. In this case, petitioner's request for an admonition was the functional equivalent of an instruction. Either form of judicial guidance accomplishes the intended purpose of serving as a prophylactic measure in protecting and furthering the Fifth Amendment privilege.

In this case, the denial of the requested admonition was not "harmless error," and the Kentucky Supreme Court did not so hold, although given the opportunity. Petitioner presented evidence at trial which tended to raise a reasonable doubt that petitioner was even present at his

home at the time of the alleged rape of which he was convicted. Petitioner's failure to testify and explain his whereabouts was obviously the result of his fear of impeachment by introduction of evidence of a prior felony conviction. In these circumstances, the denial of judicial guidance as to petitioner's failure to testify cannot be characterized as harmless beyond a reasonable doubt.

## ARGUMENT

### THE OPINION OF THE SUPREME COURT OF KENTUCKY REPRESENTS AN OBVIOUS ATTEMPT BY THAT COURT TO CIRCUMVENT THE MANDATE OF THIS COURT IN *CARTER* V. *KENTUCKY* AND DEPRIVES PETITIONER OF THE BENEFIT OF JUDICIAL GUIDANCE AS TO THE JURORS' UNDERSTANDING OF THE PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION.

Petitioner, by his counsel, requested prior to the instruction of the jury that "an admonition be given to the jury that no emphasis be given to the [petitioner's] failure to testify . . ." [JA, p. 95]. Petitioner submits that the failure of the trial court to do so deprived him of due process of law.

#### A. Petitioner Was Entitled To Judicial Guidance As To The Jurors' Understanding Of The Fifth Amendment Privilege.

The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Petitioner did not testify at his trial. Nonetheless, petitioner submits that the refusal of the trial court to guide the jury as to the nature of his privilege invokes that which the Fifth Amendment prohibits because it penalizes a defendant for *not* testifying. Or, as this Court stated in *Griffin* v. *California*, 380 U.S. 609, 614 (1965): "it cuts down on the privilege by making its assertion costly." Until recently, the law in Kentucky had

been to the effect that *no* comment (even one protective in nature) could be made on a defendant's failure to testify. *Green* v. *Commonwealth*, Ky., 488 S.W.2d 339 (1972), interpreting KRS 421.225; but see *Spencer* v. *Commonwealth*, Ky., 467 S.W.2d 128 at 130-131 (1971) and *Kelley* v. *Commonwealth*, 300 Ky. 136, 187 S.W.2d 796, 800 (1945) (holding that the defendant was entitled to an instruction upon request; the language in *Spencer* was rejected in *Green*, *supra*, as "dicta").

Notwithstanding Kentucky common law, petitioner submits that the requested "admonition" in this case is now constitutionally mandated. That petitioner's trial counsel requested an "admonition" rather than an instruction is of no legal significance, at least in the context of deciding the scope of petitioner's Fifth Amendment privilege. Whatever form of judicial guidance is requested, the constitutional underpinnings are the same. The only significant legal concern is that the jury understand a criminal defendant's privilege against self-incrimination. An admonition, which has been defined in Kentucky as "any authoritative oral communication or statement by way of advice or caution by the court to the jury respecting their duty or conduct as jurors . . .," *Miller* v. *Noell*, 193 Ky. 659, 237 S.W. 373, 374 (1922), is *functionally* equivalent to an instruction.

In *Carter* v. *Kentucky*, 450 U.S. 288 (1981), this Court reviewed a decision of the Supreme Court of Kentucky which affirmed Carter's conviction despite the refusal of the trial court to instruct the jury on Carter's failure to testify. This Court reversed, stating that:

> The freedom of a defendant in a criminal trial to remain silent 'unless he chooses to speak in the unfettered exercise of his own free will' is guaranteed by the Fifth Amendment and made applicable to state

> criminal proceedings through the Fourteenth. [Cite omitted]. And the Constitution further guarantees that no adverse inferences are to be drawn from the exercise of that privilege. [Cite omitted]. Just as adverse comment on a defendant's silence "cuts down on the privilege by making its assertion costly," [cite omitted], the failure to limit the jurors' speculation on the meaning of that silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege. *Accordingly, we hold that a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify.*
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> [*Id*, 450 U.S. at 305 (Emphasis added)].

It cannot be assumed that the jury in petitioner's case did not notice petitioner's failure to testify, and therefore drew no adverse inference therefrom. This Court has labeled such an assumption as "very doubtful . . . speculative . . . [and] dubious . . ." *Lakeside* v. *Oregon*, 435 U.S. 333 (1978). In *Lakeside*, a "no adverse inference" instruction was given over the defendant's objection. Lakeside maintained that in certain circumstances, a defendant can reasonably hope that the jury will not notice that he did not testify. [*Id*, at 339]. This Court responded that:

> . . . petitioner's argument would require indulgence in two very doubtful assumptions: First, that the jurors have not noticed that the defendant did not testify and will not, therefore, draw adverse inferences on their own; second, that the jurors will totally disregard the instruction, and affirmatively give weight to what they have been told not to consider at all. Federal constitutional law cannot rest on speculative assumptions so dubious as these.
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> [*Id*, at 340].

In a footnote in *Lakeside*, the Court noted that an adverse inference from silence "may be inevitable." Quoting Wigmore, the Court stated that: "What inference does a plea of privilege support? The layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime." [*Id*, at 340, fn. 10, citing 8 J. Wigmore, Evidence § 2272, p. 426 (McNaughton rev. 1961)].

As to the jurors' ability to follow the guidance of trial judges, this Court remarked in *Lakeside* that: "[W]e have not yet attained that certitude about the human mind which would justify us in . . . a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court. . . ." [*Id*, at 340, citing *Bruno* v. *United States*, 308 U.S. 287, 294 (1939)].

In this case, the record clearly supports the inference that petitioner's election to refrain from testifying was based upon the prospects of his impeachment with a previous felony conviction. Regardless of the advisability of such a trial tactic in that particular circumstance, this Court fashioned a rule in *Carter* that would require instruction on the defendant's failure to testify without consideration of the reason for the refusal to testify. As this Court noted in *Carter*, "[t]he inclusion of the privilege against compulsory self-incrimination in the Fifth Amendment 'reflects . . . how our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.' " *Carter*, 450 U.S. at 299-300, citing *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964). The rule is well taken. Many defendants may have reasons for declining to testify unrelated to guilt or innocence. This fact has already been recognized in the decisions of this Court. For example, in *Griffin* v. *California*, *supra*, this Court stated that:

> It is not every one who can safely venture on the witness stand, though entirely innocent of the charge

> against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would therefore willingly be placed on the witness stand. [*Id*, 380 U.S. at 613, citing *Wilson* v. *United States*, 149 U.S. 60, 66 (1892)].

As in this case, a defendant might decline to testify as a result of fear of impeachment by prior felony convictions. See *Griffin*, 380 U.S. at 615. Additionally, the defendant might be reluctant to testify out of hesitancy to "incriminate others whom they either love or fear." *Lakeside* v. *Oregon*, 435 U.S. at 344, fn. 2. As Mr. Justice Stevens stated in his dissent in *Lakeside:*

> Every trial lawyer knows that some truthful denials of guilt may be considered incredible by a jury—either because of their inherent improbability or because their explanation, under cross-examination, will reveal unfavorable facts about the witness or his associates. [*Lakeside* v. *Oregon*, 435 U.S. at 343].

The case at bar illustrates the danger in failing to guide the jury as to the Fifth Amendment privilege. If this Court was correct in stating that the average person would infer guilt from silence, then the jury in petitioner's case erroneously made that inference. As noted, *supra*, the clear implication from the record is that petitioner failed to testify due to the stated intention of the prosecutor to impeach him with a prior felony conviction. Therefore, petitioner's decision not to testify was a result of matters unrelated to guilt or innocence. Consequently, the need for a prophylactic instruction was particularly appropriate at petitioner's trial.

In explaining the rationale of *Carter* in requiring a prophylactic instruction, the Court stated:

> The *Griffin* case stands for the proposition that a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify. The penalty was exacted in *Griffin* by adverse comment on the defendant's silence; the penalty may be just as severe when there is no adverse comment, but when the jury is left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt. Even without adverse comment, the members of a jury, unless instructed otherwise, may well draw adverse inferences from a defendant's silence. [*Carter*, 450 U.S. at 301.]

Judicial guidance in the form of some type of charge to the jury is "perhaps nowhere more important than in the context of the Fifth Amendment privilege against compulsory self-incrimination, since '[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are . . . guilty of crime. . . .' [*Id*, at 302, citing *Ullman* v. *United States*, 350 U.S. 422, 426 (1955)].

It is obvious that this Court's decision in *Carter* did not turn on the *form* of the guidance which this Court directed trial judges to give juries as to the privilege against self-incrimination. In *Bruno* v. *United States*, 308 U.S. 287 (1939), this Court, in interpreting a federal statute, stated that:

> The only way Congress could provide that abstention from testifying should not tell against an accused was by an implied direction to judges to exercise their judicial duty in guiding the jury by indicating the considerations relevant to the latter's verdict on the facts. [*Bruno*, *supra*, 308 U.S. at 293].

For juries to function effectively, they must be accurately instructed in the law. As this Court has noted, judicial guidance is particularly critical when a defendant exercises his privilege against self-incrimination. An admonition would be at least *minimally* adequate to ensure that this Court's concerns about jurors' attitudes with regard to the privilege would be heeded.[6]

The opinions of this Court evidence the Court's belief that jurors will understand and follow a judge's instructions on the law. *Lakeside, supra; Carter, supra.* As this Court stated in *Starr* v. *United States*, 153 U.S. 614, 626 (1893), "[i]t is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." Or, as Mr. Justice Frankfurter wrote for the Court in *Bollenbach* v. *United States*, 326 U.S. 607, 612 (1945), "[d]ischarge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance a lucid statement of the relevant legal criteria."

A judge's responsibility to guide the jury takes the form of both admonitions and instructions. In Kentucky, the courts have acknowledged the importance of timely admonitions to the jury as to a broad range of trial circumstances. For example, trial courts either upon request or *sua sponte*, will orally charge a jury regarding testimony

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[6] As noted in *Carter*, "[t]he importance of a no-inference instruction is underscored by a recent national public opinion survey conducted for the National Center for State Court, revealing that 37% of those interviewed believed that it is the responsibility of the accused to prove his innocence. *Carter*, 450 U.S. at 303, fn. 21, citing 64 A.B.A.J. 653 (1978).

as to reputation for untruthfulness; evidence tending to show motive; evidence of other crimes; evidence of flight; and, bias of a witness.[7]

This Court surely could not have meant in its opinion in *Carter* v. *Kentucky* that a state trial court could *only* exercise its judicial duty to guide a jury by way of a *written* instruction. The Court's implicit concern was the psychological operation of the jury's mind, and petitioner submits that a judge can certainly indicate the considerations relevant to the jury's deliberation by oral admonition as well as by written instruction.

**B. Kentucky Has No Legitimate State Interest In Barring Petitioner's Claim Due To The Form Of Jury Guidance He Requested.**

The Supreme Court of Kentucky rejected petitioner's claim that he was entitled to an admonition on his failure to testify, holding that "[t]here is a vast difference in a request for an admonition and a requested instruction. James was entitled to the instruction, but did not ask for it. The trial court properly denied the request for an admonition." [JA, p. 114]. In other words, the Supreme Court of Kentucky applied a procedural bar to the relief requested due to the manner and form in which the relief was requested. It is significant that the Supreme Court of Kentucky noted that had petitioner requested an "instruction," rather than an "admonition," he would have been entitled to the relief requested. [*Id*]. Petitioner

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[7] In order to demonstrate a representative range of admonitions given to juries in Kentucky during the course of a trial, petitioner has collected pattern admonitions contained in the leading text on instructions to juries in Kentucky. *Instructions To Juries In Kentucky*, Chapter 12, "Admonitions To The Jury," John S. Palmore and Robert G. Lawson (Vol. 1, Criminal) has been included as an Appendix to the Brief for Petitioner.

submits that Kentucky has no substantial state interest in applying the procedural bar as it did in this case. In fact, petitioner would suggest that Kentucky has *no* state interest whatsoever in such a bar. Petitioner acknowledges that he has a duty to comply with rules of criminal procedure which serve a legitimate state interest. The decisions of this Court have upheld the legitimate state interest in "contemporaneous objection" rules. *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). However, there are no valid policy concerns expressed in *Wainwright* v. *Sykes*, which have application to the case at bar. In fact, petitioner *did* sufficiently comply with Kentucky's criminal rules. Kentucky Rule of Criminal Procedure 9.54(2) provides that:

> No party may assign as error the giving or failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction *or by motion, or unless he makes objection before the Court instructs the jury*, stating specifically the matter to which he objects and the ground or grounds of his objection. (Emphasis Added).

Petitioner's request for an admonition "fairly and adequately presented his position . . . by motion," and his objection to the trial court's refusal to admonish the jury fairly and adequately apprised the trial court of the relief which he was requiring. Significantly, at the time of petitioner's trial, trial judges were required by Kentucky's own Rules of Criminal Procedure to provide guidance on the failure to testify:

> The instructions shall not make any reference to a defendant's failure to testify unless so requested by him, in which event the court shall give an instruction to the effect that he is not compelled to testify and that the jury shall not draw any inference of guilt

> from his election not to testify and shall not allow it to prejudice him in any way.
>
> [Ky. Rev. Stat., R. Crim. Proc. 9.54(3) (effective September 1, 1981)].

Obviously, the trial court had notice of the requirement to instruct the jury upon request when the defendant elected not to testify. The trial court's failure to do so cannot be excused due to a technical distinction turning upon the defendant's request for judicial guidance in oral form rather than written form. The trial court could easily have granted the substance of petitioner's request by merely submitting a written instruction in conformity with his obligation. The circumstances of petitioner's case parallel circumstances at issue before this Court in *Henry* v. *Mississippi*, 379 U.S. 443 (1965). In *Henry*, the defendant's trial counsel failed to strictly comply with a Mississippi procedural requirement that an objection to illegal evidence be made at the time such evidence is introduced. Rather, Henry's trial counsel moved for a directed verdict at the close of the prosecution's case, assigning as one ground the use of allegedly illegally obtained evidence. This Court observed that "[t]he Mississippi rule requiring contemporaneous objection to the introduction of illegal evidence clearly does serve a state interests" because "[b]y immediately apprising the trial judge of the objection, counsel gives the Court the opportunity to conduct the trial without using the tainted evidence." [*Id*, 379 U.S. at 448]. Despite the trial attorney's apparent failure to scrupulously adhere to Mississippi's procedural requirements, this Court recognized that "this purpose of the contemporaneous objection rule may have been substantially served by [the defendant's] motion at the close of the State's evidence asking for a directed verdict because of the erroneous admission of the officer's testimony." [*Id*]. "For at this stage [the close of the prosecution's case in chief] the trial judge could have called for

elaboration of the search and seizure argument and, if persuaded, could have stricken the tainted testimony to go to the jury, the motion for a directed verdict might have been denied, and the case submitted to the jury with a properly worded appropriate cautionary instruction." Based upon this analysis, this Court concluded that "[i]n these circumstances, the delay until the close of the State's case in presenting the objection cannot be said to have frustrated the State's interest in avoiding delay and waste of time in the disposition of the case." [*Id.* at 448-449].

Likewise, petitioner's request for an admonition cannot be said to have frustrated Kentucky's interest in requiring objections to, or requests for, specific instructions prior to the instructing of the jury. Petitioner's request cannot be characterized as "sandbagging." The requested admonition would certainly have served petitioner's interest in having the jury decide the case only upon the evidence presented, without speculation as to his reasons for not testifying. There is no requirement in either Kentucky or the federal courts that a request for relief or an objection to procedure be phrased in the most precise manner possible. There is only a requirement that trial counsel call alleged errors to the attention of a trial court in a timely fashion, and to fairly and adequately inform the trial court of the relief which is being requested. There is no doubt in this case that petitioner's request was both timely and constitutionally adequate. Accordingly, the Kentucky Supreme Court's affirmance of the refusal to grant petitioner the relief he requested due only to his choice of the *form* of judicial guidance he requested is misconceived and represents an antiquated adherence to form over substance. Because the Kentucky Supreme Court's application of the procedural bar in this case has no foundation and serves no legitimate state

interest, this Court need not honor that bar. See *Engle* v. *Walker*, 703 F.2d 959 (CA6, 1983). "[G]iving effect to the contemporaneous-objection rule for its own sake 'would be to force resort to an arid ritual of meaningless form.' " *Henry* v. *Mississippi*, *supra*, 379 U.S. at 449. Because the refusal of the Kentucky Supreme Court to grant petitioner relief conflicts with this Court's decision in *Henry* v. *Mississippi*, this Court may address the merits of petitioner's claim.

**C. The Trial Court's Failure To Admonish The Jury Regarding Petitioner's Failure To Testify Was Not Harmless Error.**

**(i) Refusal of a trial court to guide the jury in some manner regarding the defendant's failure to testify is never harmless error.**

In its response to the petition for writ of certiorari herein, respondent argued that, "[s]hould this Court decide that the state decision does not rest upon an adequate state ground, then the cause should be remanded to the Kentucky Supreme Court for further consideration . . . to decide whether the failure to give an instruction is non-prejudicial error in this case pursuant to *Chapman* v. *California*, 386 U.S. 18 (1967)." Brief for Respondent in Opposition to Petition for Writ of Certiorari, pp. 13-14. Petitioner submits that the error complained of herein should not be susceptible to analysis under the "harmless error" doctrine. The instruction considered by this Court in *Carter* was first considered by the Court in *Bruno* v. *United States*, 308 U.S. 287 (1939). As a question of federal *statutory* law, a unanimous Court in *Bruno* decided that a federal criminal defendant was entitled upon request to a "no adverse inference" instruction. The Court in *Bruno* specifically refused to apply 28 U.S.C.

§ 391 (1928)*, the federal "harmless error" rule. This Court noted in *Bruno* that the harmless error rule was designed to eliminate reversal based upon "mere etiquette of trials and the formalities in minutiae of procedure. . . ." 308 U.S. at 294. "*Of a very different order of importance is the right of an accused to insist on . . . [the "no inference" instruction].*" [*Id.* (Emphasis Added)]. *Bruno* then, stands for the proposition that, as a matter of federal statutory procedure, refusal to give the instruction cannot be harmless error.

Of course, *Carter* constitutionalized the requirement first announced in *Bruno* that a criminal defendant was entitled to a "no inference" instruction upon request. In analyzing harmless error in the context of the denial of constitutional rights, this Court has placed a burden upon the prosecution to demonstrate that the error is harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967). Because this more stringent harmless error analysis applies to constitutional violations, and since refusal of a "no inference" instruction is not harmless under federal statutory procedure, it necessarily follows that the same error cannot be held harmless under a constitutional analysis.

Admittedly, *Chapman* held that prosecutorial comment on the defendant's failure to testify, in violation of *Griffin* v. *California*, might constitute error which would be harmless. Nonetheless, there are sound policy reasons why *Chapman* should not be applied to *Carter* errors although it is applied to *Griffin* errors. *Griffin* errors are committed by the prosecutor, *not* the court. Criminal defendants and defense attorneys cannot predict the

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* The statute required disregarding "technical errors . . . which do not affect the substantial rights of the parties." The federal harmless error rule is now codified as 28 U.S.C. § 2111 (1959).

occurrence of prosecutorial comment on the defendant's failure to testify. In the event that the prosecutor elects to inject constitutional error by commenting on the defendant's failure to testify, a trial court is placed in a position of having to determine whether or not it can cure such error by an admonition, assuming there is timely request, or whether or not the error requires a mistrial. The curative admonition would in effect be a substitute (albeit, a minimally adequate one) for the jury guidance mandated under *Carter*.

Unlike the speculative nature of predictions as to what the prosecutor may or may not do in closing argument, criminal defendants and defense attorneys should be able to rely upon trial court's fulfilling their constitutional obligations. It is universally recognized that "the accused has the ultimate authority to make certain fundamental decisions regarding the case," including the decision whether or not to testify in his own behalf. *Jones* v. *Barnes*, ___ U.S. ___, 103 S.Ct. 3308 (1983). The decision of a criminal defendant is entitled to "the guiding hand of counsel" in making this critical choice as to whether or not to testify. *Brooks* v. *Tennessee*, 406 U.S. 603 (1972). While counsel cannot "guide" a defendant's decision by informing him as to whether or not he will be penalized by prosecutorial misconduct in comment upon his failure to testify, counsel *should* be able to inform a defendant who might elect not to testify that the trial court will in fact provide some guidance to the jury regarding the nature of the Fifth Amendent privilege. In *Carter*, this Court left the decision as to whether or not the trial court would provide jury guidance on the privilege *to defense counsel*.

It would be extremely unfair to allow "harmless error" analysis of refusals to give "no inference" instructions (or

admonitions) because the analysis is by necessity limited to a review of the *record*. The decision-making process by which defense counsel and the defendant come to the conclusion that jury guidance is uncalled for will not appear on the record. Consequently, if the defense attorney and defendant arrive at a decision that the defendant will not testify, in reliance upon the anticipated judicial guidance on the Fifth Amendment privilege, and such is not forthcoming, the trial court has then not only infringed the Fifth Amendment privilege, but invaded the defendant's Sixth Amendment right to counsel. This sort of judicial invasion of the Sixth Amendment right should never be countenanced as harmless error. See *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

*Chapman* does not stand for the proposition that harmless error analysis is a constitutional imperative. "Chapman stands only for the proposition that certain constitutional guarantees do not *themselves* require reversal for harmless violations. If there is *other* authority, aside from the constitutional provisions violated in the case, that supports either a decision not to apply the rule or to reverse a conviction even though the error at issue is harmless, *Chapman* does not stand as a bar to such action. *United States* v. *Hasting*, ___ U.S. ___, 103 S.Ct. 1974, 1989 (1983) (Brennan, concurring in part and dissenting in part) (Emphasis in original). In the case at bar, the importance of criminal defendants being able to make *reasoned* decisions as to whether or not to testify, after consultation with counsel, supports a *per se* rule requiring *Carter*-type instructions or admonitions upon request.

**(ii) The trial court's refusal of the requested admonition at petitioner's trial was not harmless beyond a reasonable doubt.**

The evidence in this case was not "overwhelming," such that any constitutional error was "harmless beyond a reasonable doubt." While much of the evidence was "uncontradicted," that circumstance is going to occur very often when a defendant exercises his right not to testify. The fact that the jury might infer guilt from silence, when in fact the decision not to testify is unrelated to guilt or innocence, is the precise reason for judicial guidance on the privilege. In any event, the evidence in this case does not necessarily exclude every reasonable doubt. For example, there was evidence that petitioner disclaimed ownership of the bag which contained both the pistol stolen from the prosecutrix and strips of cloth allegedly used to gag the prosecutrix. [JA, p. 75]. Evidence of a fingerprint alleged to be that of petitioner was critical to the Commonwealth's case regarding the burglary. However, there was testimony from the prosecutrix that petitioner had been in her home on previous occasions. [JA, pp. 42-43]. And, the Commonwealth's own expert admitted that fingerprints can last "several years." [Transcript of Evidence, Vol. III, p. 82]. There was no evidence that the fingerprint in question was impressed at the time of the burglary. Fingerprint evidence *alone* is insufficient to convict, absent proof of circumstances that the fingerprints could *only* have been impressed at the time the crime was committed. See *Borum* v. *United States*, 380 F.2d 595 (CADC, 1967); *Hiet* v. *United States*, 365 F.2d 504 (CADC, 1966); *United States* v. *Collon*, 426 F.2d 939 (CA6, 1970). As to evidence of the rape, petitioner presented evidence that, had he been at the crime scene at the time the alleged crime was being perpetrated, he would have been seen. In other

words, defendant had *some* evidence that he was not even there.

The evidence that the Commonwealth presented created the situation where the logical person to testify to facts which would contradict the Commonwealth's evidence would be petitioner himself. The danger that petitioner's silence would be equated with guilt is the precise danger this Court sought to avoid in *Carter*. There is ample support in the record that petitioner's election not to testify was based upon his fear of impeachment with a prior felony conviction. In other words, petitioner's exercise of his right not to testify was based upon reasons unrelated to guilt or innocence. It simply cannot be said that the refusal of the trial court to provide some guidance to the jury by way of admonition regarding petitioner's failure to testify was "harmless beyond a reasonable doubt."

It is important to note that the Supreme Court of Kentucky did *not* decide this case on the basis of harmless error. Rather, the Supreme Court of Kentucky's disposition of this issue was decided *entirely* on the terminology of petitioner's request:

> James requested that the trial court give an "admonition" to the jury that no emphasis be given to James' failure to testify. This request was denied by the trial court. In his argument on this appeal James attempts to equate this request for an admonition with a request for an "instruction" on failure of the defendant to testify.
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> * * *
>
> There is a vast difference in a request for an admonition and a requested instruction. James was entitled to the instruction, but did not ask for it. The trial court properly denied the request for an admonition. [A., p. 3].

Had the Kentucky court chosen to decide this case on "harmless error," it could have done so. Only two weeks prior to the opinion of the Kentucky Supreme Court in petitioner's case, the Court decided *Commonwealth* v. *McIntosh*, Ky., 646 S.W.2d. 43 (February 16, 1983). In *McIntosh*, the Kentucky Supreme Court stated that:

> . . . *Carter* leaves open the question of whether under certain circumstances the failure to give the requested instruction could be nonprejudicial error pursuant to the standards set in *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).
>
> * * *
>
> Here proof of guilt was overwhelming. . . . Careful examination of the record does not indicate that any different result would have been achieved in this case.
>
> It is the holding of this court that the failure to give a requested instruction on the effect of the defendant's refusal to testify can be nonprejudicial error if there is overwhelming evidence of guilt and the result would not have been any different when the case is considered as a whole.

Obviously, the Kentucky Supreme Court would have applied the doctrine of harmless error, had it thought that the error in petitioners case was in fact harmless. Because the error was not in fact harmless beyond a reasonable doubt, this Court should reverse his conviction, and grant him a new trial.

## CONCLUSION

Petitioner's case presents an opportunity for this Court to reaffirm the clear mandate of *Carter* v. *Kentucky*, and further, provides an opportunity to prevent state appellate courts from distorting the clear import of the decisions of this Court. Because the decision of the Supreme Court of Kentucky in this case conflicts with the rationale of *Carter* v. *Kentucky*, this Court should reverse petitioner's conviction and grant him a new trial.

Respectfully submitted,

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# APPENDIX TO BRIEF FOR PETITIONER

INSTRUCTIONS TO JURIES IN KENTUCKY
BY
JOHN S. PALMORE
JUDGE OF THE COURT OF APPEALS OF KENTUCKY
and
ROBERT G. LAWSON

(VOLUME ONE, CRIMINAL)

CHAPTER 12. "ADMONITIONS TO THE JURY"

* * *

**Sec. 12.04 Exclusion of Testimony.**

The testimony relating what the witness was told by Mrs. Martin is not competent evidence in this case, and you are admonished to disregard it entirely and put it out of your minds, remembering your oath to try the case according to the evidence.

References: Bess v. Com., 116 Ky. 929, 25 KLR 1091, 77 S.W. 349, 352-353 (1903).

* * *

**Sec. 12.12 Impeachment of Witness—Previous Felony Conviction.**

***(Example 1)***

The fact that the defendant has been previously convicted of a felony is not to be considered by you to any degree whatever as evidence of his guilt in this case, but only insofar as it may have a bearing, if it does so, upon his truthfulness as a witness and the weight to be given to his testimony.

References: CR 43.07; RCr 13.04; House v. Com., Ky. 466 S.W.(2d) 949, 951 (1971). See also Cotton v. Com., Ky., 454 S.W.(2d) 698, 700-702 (1970).

***(Example 2)***

The fact that the witness has been convicted of a felony may not be considered by you for any purpose in this case except

insofar as it may have a bearing, if it does so, upon his truthfulness as a witness and the weight to be given to his testimony.

References: CR 43.07; RCr 13.04; Kelly v. Com., 259 Ky. 770, 83 S.W.(2d) 489, 490 (1935). See also Cole v. Com., 260 Ky. 758, 86 S.W.(2d) 984 (1935) [impeachment with respect to dying declaration].

* * *

**Sec. 12.14 Impeachment of Witness—Reputation for Untruthfulness.**

***(Example 1)***

The testimony concerning the defendant's reputation [for untruthfulness] is not to be considered by you to any degree whatever as evidence of his guilt in this case, but only insofar as it may have a bearing, if it does so, upon his truthfulness as a witness, and the weight to be given his testimony.

***(Example 2)***

The testimony concerning the reputation of the witness [for untruthfulness] is not to be considered by you for any purpose in this case except insofar as it may have a bearing, if it does so, upon his truthfulness as a witness and the weight to be given his testimony.

References: See References and Comment following. Sec. 12.12.

**Sec. 12.16 Impeachment of Witness—Inconsistent Statements.**

If the witness Johnny Applejack was heard to make a statement at another time and place which contradicts or is inconsistent with his testimony during this trial, that statement made out of court (if he did make it) is not to be considered by you to any degree whatever as evidence of the defendant's guilt or innocence, but only insofar as it may have a bearing, if it does so, upon the truthfulness of the witness's testimony.

References: CR 43.07, RCr 13.04; Lynch v. Com., Ky., 472 S.W.(2d) 263 (1971).

* * *

**Sec. 12.26 Other Crimes—Motive of Defendant.**

You shall not consider the evidence concerning the burning of the house, the removal of its contents, and the collection of the insurance money for any purpose except insofar as it may tend to show, if it does so, a motive on the part of the defendant to commit the offense for which he is being tried in this case.

References: Bess v. Com., 116 Ky. 927, 25 KLR 1091, 77 S.W. 349, 353-354 (1903) [Murder—Collaboration of deceased and defendant in burning house and subsequent collection of insurance proceeds by defendant].

**Sec. 12.28. Other Crimes—Showing Knowledge or Identity.**

The testimony you have just heard with reference to the defendant's possession of property that may have been stolen by someone at a different time and place and from other premises than those involved in this proceeding is not evidence of his guilt, and is not to be considered by you in any respect whatever except insofar as it may tend to show, if it does so, the defendant's identity with or knowledge of the offense for which he is being tried in this case:

References: Acree v. Com., 243 Ky. 216, 47 S.W.(2d) 1051, 1054 (1932) [Conspiracy to break into storehouse—Possession of property stolen from other premises]; Richardson v. Com., 166 Ky. 570, 179 S.W. 458, 461-462 (1915) [Breaking into depot—Possession of property stolen from other premises].

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**Sec. 12.32 Other Crimes—Showing Plan or System.**

The testimony concerning the defendant's conduct upon occasions other than the transaction out of which this case arises may be considered by you only insofar as it may tend to show, if it does so, a plan or system on the defendant's part.

References: Lee v. Com., Ky., 242 S.W.(2d) 984, 987 (1951) [Obtaining money by false pretenses—previous similar conduct].

**Sec. 12.42 Threats against Defendant—Showing Motive or Intent.**

The testimony by this witness concerning threats made by the decedent with respect to the defendant may not be considered by you to any extent whatever except insofar as it may tend to show motive or intent on his part, if it does so, to commit the alleged offense for which he is being tried.

References: McQueen v. Com., 196 Ky. 227, 244 S.W. 681, 683 (1922) [Homicide—Threat by victim to have defendant arrested, of which defendant had knowledge].

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**Sec. 12.50 Flight—Attempt to Evade Arrest—Showing Intent, Motive or Knowledge.**

The testimony concerning the alleged break-in at Toohey's garage and the events immediately following may be considered by you only insofar as it may tend to show, if it does so, that the deceased officer had reasonable grounds for believing that a felony had been committed, that the defendant was one of the guilty parties, and that the deceased had the right to arrest him, and insofar as it may tend to show, if it does so, a motive or intent on the part of the defendant with respect to the alleged offense for which he is being tried in this case.

References: Patton v. Com., 289 Ky. 627, 159 S.W.(2d) 1006, 1011 (1942) [Homicide—Events preceding shooting of peace officer].

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**Sec. 12.80 Bias of Witness.**

The testimony that on an occasion previous to the indictment in this case the defendant had caused the witness Allen to be arrested may not be considered by you for any purpose whatever except insofar as it may tend to show bias on the part of the witness and bear upon the truthfulness of his testimony in this proceeding, if it does so.

References: Richardson v. Com., 201 Ky. 395, 257 S.W. 8, 9 (1923).